Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–594 OF 1997
KAMALANATHAN RATNAM J
5 AUGUST 1999

Costs *— Interlocutory proceedings — Frivolous and vexatious application dismissed with costs — Whether costs payable forthwith or at end of trial*

Costs *— Interlocutory proceedings — Defendant unsuccessful in striking out writ — Whether plaintiff ought to be able to tax costs forthwith*

The defendant's application to strike out the plaintiff's claim for, inter alia, damages for breach of promise to marry under O 18 r 19 of the Rules of the High Court 1980 ('the Rules') was dismissed with costs. Pursuant to the order, the plaintiff filed his bill of costs to be taxed. On the date fixed for taxation, the defendant raised a preliminary objection, contending that the costs were only to be taxed at the end of the trial. The deputy registrar upheld the preliminary objection and the plaintiff appealed. At the appeal, counsel for the plaintiff, relying on O 59, argued that the court could deal with the question of costs at any stage of the proceedings.

Held, allowing the appeal:

(1) The defendant who pleaded illegality to the plaintiff's claim for, inter alia, damages for breach of promise to marry, ought clearly to have known that the issue of illegality was a non-starter. The plaintiff, a Muslim bound by a different set of personal laws was entitled to more than one wife. Thus, the defendant's application was frivolous and vexatious and amounted to the defendant taking unnecessary or improper action (see pp 587H–I, 588G).

(2) If the defendant had succeeded, the case would have been at an end and the defendant would have been entitled to proceed to tax costs. Conversely, if the defendant failed, as in the instant case, the plaintiff ought to be entitled to tax costs forthwith (see p 588A).

(3) Where a defendant fails to strike out a writ, the successful plaintiff ought to be able to tax his costs forthwith notwithstanding the omission of the words forthwith, so long as the order does not state that the plaintiff's costs be costs in the cause (see p 588A–B).

(4) Where a frivolous application has been made, the court may order costs to be taxed and paid forthwith (see p 588H).

Obiter:

The words 'costs in any event' do not mean that the party awarded such costs will have to await the conclusion of the case to tax his costs. However, whether such costs are to be paid forthwith is another issue. Where the order states 'costs in any event to the plaintiff to be taxed

A and paid forthwith' then costs should be paid to the plaintiff forthwith. Otherwise, ordinarily whilst the plaintiff is allowed to tax his costs, the payment ought to await the final outcome of the full trial (see p 588C–E).

B **[Bahasa Malaysia summary**

Permohonan defendan untuk membatalkan tuntutan plaintif, antara lain, untuk ganti rugi mungkir janji perkahwinan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') telah ditolak dengan kos. Berikutan dengan perintah tersebut, plaintif telah memfailkan bil kos yang ditetapkan. Pada hari yang ditetapkan untuk
C pentaksiran, defendan telah menimbulkan bantahan awalan, menegaskan bahawa kos itu hanya boleh ditetapkan di penghujung perbicaraan. Timbalan pendaftar mengesahkan bantahan awalan itu dan plaintif telah merayu. Di dalam rayuan, peguam plaintif bergantung kepada A 59 menghujahkan bahawa mahkamah boleh menjalankan persoalan mengenai kos itu pada mana-mana peringkat
D prosiding.

Diputuskan, membenarkan rayuan tersebut:

(1) Defendan yang mengemukakan kepenyalahan undang-undang kepada tuntutan plaintif, antara lain, untuk ganti rugi mungkir
E janji perkahwinan sepatutnya dengan jelas mengetahui bahawa isu kepenyalahan undang-undang bukanlah satu pencetus. Plaintif, seorang Muslim, yang terikat kepada satu set undang-undang peribadi yang berbeza, adalah layak untuk mempunyai lebih daripada seorang isteri. Oleh itu, permohonan defendan adalah remeh dan menyusahkan dan ini bererti bahawa defendan
F mengambil tindakan yang tidak perlu dan tidak betul (lihat ms 587H–I, 588G).

(2) Sekiranya defendan telah berjaya, kes itu akan berakhir dan defendan akan layak untuk meneruskan penetapan kos. Sebaliknya jika defendan gagal, seperti mana di dalam kes ini,
G plaintif akan layak untuk menetapkan kos dengan serta merta (lihat ms 588A).

(3) Di mana defendan gagal untuk membatalkan suatu writ, plaintif yang berjaya akan boleh menetapkan kos beliau dengan serta-merta walaupun peninggalan perkataan-perkataan dengan serta merta, asalkan perintah itu tidak menyatakan bahawa kos plaintif
H adalah kos mengikut kausa (lihat ms 588A–B).

(4) Di mana permohonan yang remeh telah dibuat, mahkamah boleh memerintahkan agar kos ditetapkan dan dibayar dengan serta-merta (lihat ms 588H).

I **Obiter:**

Perkataan 'kos di dalam apa keadaan' tidak bermaksud bahawa pihak yang diawardkan kos tersebut perlu menunggu keputusan kes itu

untuk menetapkan kosnya. Walau bagaimanapun, sama ada kos tersebut perlu dibayar serta merta merupakan satu isu lain. Di mana perintah menyatakan 'kos di dalam apa keadaan kepada plaintif ditetapkan dan dibayar serta-merta', maka kos tersebut hendaklah dibayar kepada plaintif dengan serta-merta. Jika sebaliknya, kebiasaannya semasa plaintif dibenarkan menetapkan kos beliau, pembayaran sepatutnya dinantikan sehingga keputusan muktamad perbicaraan penuh itu (lihat ms 588C–E).]

Notes

For cases on interlocutory proceedings, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1278–1280.

Cases referred to

Hai Yue Hin v Public Feedmill (M) Sdn Bhd [1997] 3 MLJ 730 (refd)
Ho Yoke Kwei & Anor v Ong Eng Hin [1997] 4 AMR 4078 (refd)
Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304 (refd)

Legislation referred to

Rules of the High Court 1980 O 59 r 4

M Manoharan (Karpal Singh & Co) for the plaintiff.
Roshan Kumar (Bachan & Kartar) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The facts relating to this case in so far as it is relevant to this appeal have been set down by me in an earlier judgment where the defendant applied to strike out the plaintiff's case under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') (see [1999] 2 MLJ 567). Having heard full arguments, I dismissed the said application with costs.

The appeal

Pursuant to the said order the plaintiff filed his bill of costs to be taxed. On the date fixed for the taxation, the defendant raised a preliminary objection which was that the bill of costs ought to be taxed only at the end of the trial and not presently. On 28 June 1999, the learned Deputy Registrar upheld the preliminary objection and struck out the bill of costs with costs and with liberty to refile. This appeal by the plaintiff is against that order.

Findings of the court

The relevant order relating to this issue is O 59 r 4 of the RHC which reads as follows:

A Stage of proceedings at which costs to be dealt with (O 59 r 4)

(1) Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

B Relying on this rule the plaintiff advanced the argument that the court has power to deal with the question of costs 'at any stage of the proceedings'. Mr Manoharan for the plaintiff relied heavily on the decision of my learned brother Suriyadi J in *Ho Yoke Kwei & Anor v Ong Eng Hin* [1997] 4 AMR 4078. In that case the plaintiff applied (in the lower court) to strike out the C defence and counterclaim; however, only the counterclaim was struck out. The defendant filed a notice of appeal against that decision. The High Court dismissed the appeal with costs. The plaintiff then proceeded to file his bill of costs. The learned senior assistant registrar overruled the defendant's preliminary objection that the issue of costs should be settled at the end of the action. The defendant appealed against this decision. My D learned brother held that as the order of the High Court did not specify the time of payment of the costs the plaintiff was entitled to have his costs taxed without having to wait for the conclusion of the case. He was also of the view that if the said order had contained the words 'in any event' or 'costs in the cause', then the plaintiff would have had to wait until the end of the action to have the bill of costs taxed.

E Learned counsel for the defendant relied on the decision of the Court of Appeal in *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730. In that case, the court held that since there was no suggestion that the costs were intended to be paid forthwith, it was ordered that the costs was to be paid only at the conclusion of the case. In arriving at this conclusion the F court decided to follow the decision in *Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd* [1990] 1 MLJ 304. In *Ko Ko Ma*, the defendant applied for the setting aside of an interim injunction obtained by the plaintiff in respect of the tenancy of certain premises. The application was dismissed by the learned Judge with costs. In concluding that the costs of interlocutory proceedings should only be made payable forthwith or in G any event when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct or that the party has taken unnecessary or improper action, the learned judge reasoned that in the case before him, since the claim was for a declaration that the tenancy of the premises was valid and subsisting and since the plaintiff was claiming a permanent injunction against the defendant, it was therefore only proper H that the costs of the interlocutory application be taxed and paid at the conclusion of the trial.

In the case before me, the defendant pleaded illegality when the defendant ought clearly to have known that the application to strike out was indeed a non-starter because, since the plaintiff was a Muslim and was I entitled to more than one wife, the defence that her promise to marry the plaintiff if any was against public policy could never have been sustained because of the plaintiff's personal law. This was indeed a frivolous and vexatious application.

In any case, had the defendant succeeded in the application then the case would have been put to an end and the defendant would have been entitled to proceed to tax her costs. Conversely, where the defendant has failed, it cannot therefore be gainsaid that the plaintiff ought to be allowed to tax his costs. It is my judgment therefore that where a defendant applies to strike out a writ the successful plaintiff ought to be able to tax his costs forthwith notwithstanding the omission of the words forthwith, so long as the order does not state that the plaintiff's costs be costs in the cause. I am also of the view that the words 'costs in any event' do not mean that the plaintiff will have to await the conclusion of the case to tax his costs. A Judge making such an order must have appreciated the fact that the conduct of the defendant was such that he ought to pay the costs of the said application, in any event, that is, even if the defendant finally succeeds at the trial. Therefore what is there that should prevent the successful party from taxing the costs forthwith when he obtains an order that he is entitled to costs in any event. At least that part of the case has been concluded to its finality inclusive of taxation. However, as to whether such taxed costs ought to be paid forthwith is another issue. If the order states 'costs in any event to the plaintiff to be taxed and paid forthwith' then it is clear what the order means. Otherwise, it is my judgment that whilst the plaintiff is allowed to tax his costs the payment ought to await the final outcome of the full trial. This view is clearly in line with the decision of the Court of Appeal in *Hai Yue Hin* wherein Shaik Daud JCA who gave the decision of the Court opined that since the question of costs is left to the discretion of the Court, unless there is an order that the costs be *paid* forthwith, the costs should only be paid after the conclusion of the proceedings.

A B C D E

However, since in this case I have held that the application from its inception had no leg to stand on, and that this ought clearly to have been within the knowledge of the defendant herself and in line with the reasoning in *Ko Ko Ma*, which was accepted and adopted by the Court of Appeal in *Hai Yue Hin* that the costs of interlocutory proceedings should only be made payable forthwith or in any event when the party against whom the order has been made has been guilty of various conduct including taking unnecessary or improper action, it is my judgment that filing the application to strike out the writ when it was doomed from the start, was indeed 'taking unnecessary or improper action'. I am also of the view that this will discourage the filing of obviously unnecessary and improper actions or applications.

F G

In the circumstances, therefore, I set aside the order of the learned Deputy Registrar and order that he proceed to reinstate the bill of costs in the cause list and that the same be taxed and the taxed costs be paid forthwith. The plaintiff will also have the costs of this appeal which shall also be taxed and paid forthwith.

H

Appeal allowed.

I

Reported by Andrew Christopher Simon